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No. 84-1379

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

Eugene F. Diamond, M.D. and
Jasper F. Williams, M.D.,
Appellants,
vs.
Allan G. Charles, M.D., et al.,
Appellees,
and
The Hope Clinic for Women, Ltd., et al.,
Appellees.

On Appeal from the United States Court
of Appeals for the Seventh Circuit

JOINT APPENDIX

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APPEAL DOCKETED FEB. 28, 1985
PROBABLE JURISDICTION NOTED MAY 20, 1985

BEST AVAILABLE COPY

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1379

EUGENE F. DIAMOND, M.D. and
JASPER F. WILLIAMS, M.D.,
Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,
Appellees,

and

THE HOPE CLINIC FOR WOMEN, Ltd., et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

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DATE	PROCEEDINGS
10-31-79	Affidavits of Allan G. Charles, M.D., Louis Gerald Keith, M.D., David Zbaraz, M.D., and Hector N. Zevallos, M.D., filed.
11-7-79	Affidavits of Joseph T. Gallagher, M.D., and Thomas G. Gorman, M.D., filed.
11-9-79	Affidavit of Martin Motew, M.D., filed.
11-19-79	By FLAUM, J - Memorandum Opinion dated November 16, 1979, granting in part and denying in part plaintiffs' motion for preliminary injunction.
7-9-82	Affidavits of Diana Shark, Mary Christine Gaspar, Debra Elrod Evans, and Jasper F. Williams, M.D. filed.
7-29-83	Defendant Richard M. Daley's adoption of motion for summary judgment and supporting brief of intervening defendants.
7-29-83	Defendants Hartigan and Kempiners' adoption of supplemental brief of intervening defendants.

DATE	PROCEEDINGS
10-6-83	Intervening defendants' motion to permit filing of supplemental brief and to set briefing schedule.
10-17-83	By KOCORAS, J - order dated October 5, 1983, denying intervening defendants' motion to permit filing of supplemental brief and to set briefing schedule.
10-27-83	Plaintiffs' motion to amend judgment of October 14, 1983, filed.
10-31-83	Intervening defendants' memorandum in support of the constitutionality of section 6(4) of the Illinois Abortion Law of 1975 filed.
11-9-83	By KOCORAS, J - order dated November 2, 1983, amending the judgment dated October 14, 1983.
11-2-83	By KOCORAS, J - amended opinion [reported at 579 F.Supp. 464 (1984)].
12-2-83	Intervening defendants Eugene F. Diamond, M.D. and Jasper F. Williams, M.D.'s notice of appeal from the October 14, 1983, and November 2, 1983, orders filed.

DOCKET ENTRIES

DATE	PROCEEDINGS
12-16-83	Plaintiffs' notice of cross-appeal from the November 2, 1983, order filed.
1-18-84	Letter from appellee Richard M. Daley to adopt brief of Eugene Diamond, M.D. and Jasper F. Williams, M.D. filed.
1-26-84	Letter from defendant-appellant Neil F. Hartigan adopting brief of intervening defendants-appellants filed.
8-6-84	Appellants cross-appellees' judicial notice per C.R. 11 filed.
11-30-84	By PELL, J - final judgment, affirmed in part and reversed in part.
11-30-84	By PELL, J - opinion.

The following opinions, decisions, judgments, and orders have been omitted in printing this Appendix because they appear on the following pages in the Appendix to the printed Jurisdictional Statement:

Opinion of the Court of Appeals
for the Seventh Circuit,
dated November 30, 1984.....A1
Judgment of the Court of Appeals
for the Seventh Circuit,
dated November 30, 1984.....A50

The following opinions, decisions, judgments, and orders have been omitted in printing this Appendix because they appear on the following pages in the Appendix to the Plaintiffs' Motion to Dismiss or Affirm:

Opinion of the District Court,
Northern District of
Illinois, dated November
16, 1979.....1a

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALLAN G. CHARLES, M.D., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4541
BERNARD CAREY, et al.,	)	
Defendants.	)	
THE HOPE CLINIC FOR WOMEN, LTD., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4548
WILLIAM J. SCOTT, et al.,	)	
Defendants.	)	Judge Joel M. Flaum

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

ALLAN G. CHARLES, M.D.

ALLAN G. CHARLES, M.D., being duly sworn, deposes and states as follows:

1. I received my M.D. degree in 1952 from the New York University College

of Medicine and am a registered and licensed physician in the State of Illinois. I am actively engaged in the practice of obstetrics and gynecology and am currently a member of the Department of Obstetrics and Gynecology at Michael Reese Hospital, Chicago, Illinois, and am clinical professor of obstetrics and gynecology at the University of Chicago. I am a Diplomate of the American Board of Obstetrics and Gynecology and a Fellow of the American College of Obstetrics and Gynecology. I am a member of the American Medical Association, the Illinois Medical Society and the Chicago Medical Society. I have researched and published numerous articles in the field of obstetrics and gynecology, including, but not limited to, articles on amniocentesis, the "Rh (rhesus)" factor and a chapter in the Encyclopedia of Obstetrics and Gynecology

on these subjects.

2. I share my practice with five other obstetricians/gynecologists. My practice is approximately 50 percent obstetrics, of which approximately three percent or a minimum of three patients per week are pregnancy terminations.

3. Based on my knowledge and experience it is my opinion that:

(a) Section 2(2) defining viability in terms of "more than momentary survival is medically incorrect, confusing and interferes with the exercise of my best medical judgment.

(b) The criminal sanctions of Section 6(4), which establishes an impossible standard of care, prevents me from performing second trimester abortions.

(c) Section 6(3) prohibits the accepted medical practice of testing for genetic complications in aborted fetuses.

fringes on my freedom of speech. Patients misled by this advice who decline to use birth control when so described will have unwanted pregnancies, thus exposing themselves to the medical risks associated with pregnancy termination and childbirth. Unwanted pregnancies have a higher risk of complications and death than do wanted pregnancies.

(e) Section 6(6) which requires me to offer a patient medication for relief of "fetal pain" is medically meaningless, confusing, medically unjustified, and contraindicated. This requirement is cruel and harmful to my patients and establishes a duty which can not be met subjecting me to criminal penalties.

(f) I usually include any persons my patient wants involved in their preliminary consultations, spouses, parents, relatives or friends. But the

requirement of parental and spousal consultation against the wishes of my patients in Sections 3(3) and 3(4) are burdensome, interfere with the privacy of the physician-patient relationship, and cause harmful stress. Many of my patients will avoid this stress by seeking illegal pregnancy terminations, thereby subjecting themselves to much greater medical risks.

(g) Section 3, requiring me to state to my patients and third parties the gestational age of the fetus and also distribute State of Illinois materials which will detail the probable anatomical and physiological characteristics of the fetus, is cruel and punitive toward my patients, causing harmful stress, and can be detrimental to maternal health.

(h) The rigid procedures required for informed consent in Section

3(2) are cruel and punitive to my patients, medically unjustified, unrelated to informed consent, violative of the privacy of the physician-patient relationship, and impairs [sic] my patients' trust in my medical judgment.

(i) SB47 unnecessarily hampers the exercise of my medical judgment, violates my responsibility to my patients, and violates my sense of personal ethics. I would not be able to perform pregnancy terminations in the State of Illinois under this Act.

4. I find the "medical judgment", I am required to make under Section 3.1 of SB47 confusing, failing to provide me any guidance as to what medical criteria or other standards which I am required to adhere to in deciding to perform pregnancy terminations. I perform first trimester abortions and in the past have

performed such abortions at the request of the patients, or abortions which might be considered "elective abortions." Section 3.1 would appear to preclude me from performing such abortions. I also perform second trimester abortions and in the past have performed them because of ascertainbable genetic defects in the fetus. Section 3.1 would seem to preclude me from performing such second trimester abortions.

/S/
ALLAN G. CHARLES, M.D.

[Notarized 10/31/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Joel M. Flaum

(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

LOUIS GERALD KEITH, M.D.

Affiant, LOUIS GERALD KEITH, M.D., being duly sworn on oath deposes and states as follows:

1. I received my M.D. degree from the Chicago Mediaal [sic] School in 1960. I am a registered and licensed physician in Illinois and am actively engaged in the practice of obstetrics and gynecology. I am a professor of obstetrics and gynecology at Northwestern University Medical School, Chicago, Illinois, and a lecturer in obstetrics and gynecology at the Cook County Graduate School of Medicine,

Chicago, Illinois. I am also the Attending Physician, Department of Obstetrics and Gynecology the Prentice Women's Hospital and Maternity Center, Chicago, Illinois. I share a practice with eleven other obstetricians/gynecologists, all of whom are also full-time professors of obstetrics and gynecology at Northwestern University Medical School. I am a Diplomate of the American Board of Obstetrics and Gynecology, and a Fellow of the American College of Obstetricians and Gynecologists, and a Fellow of the American College of Surgeons. I have published or edited numerous articles and books in the field of obstetrics and gynecology, including but not limited to Monitoring Care in Abortion Clinics, 21, J. Reprod. Med. 163 (1978), Abortion and Maternal Health An American Perspective. 63, Int. Surgery 31 (1978), Postpartum and

Postabortal Contraception, (1979), and Safety of Fertility Control, unpublished, publication date early in 1980) editor, and Second Trimester Abortion, (unpublished, publication date early in 1980).

2. Approximately twenty percent of my gynecological practice is devoted to pregnancy terminations or consulting with the National Abortion Federation and the Fields Foundation, private agencies which are involved in the voluntary regulation of abortion clinics.

3. Based upon my knowledge and experience, it is my opinion that:

(a) Section 2(2), defining viability to include a "reasonable likelihood of more than momentary survival" is contrary to medical literature, confusing and hampers the exercise of my best medical judgment.

(b) The statute uses language

that is meaningless from a medical perspective, such as the definition of fetus in Section 2(9) which is contrary to the definition in Dorlan's Medical Dictionary, 25 ed. (1974) and omits any reference to the embryo, which is the standard medical term for the tissue having the potential for human life from conception to eight weeks gestation.

(c) Section 3.1(a) prohibiting any abortion that is not necessary is confusing and would prohibit me from doing elective pregnancy terminations, which are currently a part of my practice.

(d) Section 3.1(b) requiring a written report for the State of Illinois describing the basis for my judgment that the pregnancy termination is necessary subjects me to the possibility of self-incrimination for having done all elective and some therapeutic pregnancy

terminations and, as such, seriously deters me from doing pregnancy terminations.

(e) The provisions for the Act providing alternative requirements for medical emergencies are confusing. Medical emergency, when read in context, acquires a narrow meaning of near death and unconsciousness, contrary to usual medical practice. It interferes with the exercise of my best medical judgment by deterring me from insuring that medical judgments are made in the patients'favor. In order to avoid an unnecessary ethical dilemma, possible self-incrimination and criminal penalties, I will stop performing pregnancy terminations.

(f) Section 3.2 requiring that I personally consult with clinic patients 24 hours before their pregnancy termination if I am to perform the procedure is

medically unnecessary and burdensome. This section will cause up to two days' delay, given the limited hours of surgical facilities, and will cause anxiety which will necessitate increased use of tran quilizers, sedatives, anesthetics, thus retarding recovery and precipitating psychological problems.

(g) The disclosure provisions of Sections 3.2, 3.3 and 3.4 are confusing because long-term sequela [sic] for pregnancy terminations have not been determined and may not exist.

(h) The parental consultation requirement of Section 3.3 is confusing since it contradicts the Illinois Law (1967) which allows confidential medical treatment of teenagers for pregnancies. Pregnancy termination is a recognized form of treatment for pregnancies. Furthermore, this section subjects my

patients to unnecessary stress and some of them will seek unlicensed persons to do criminal abortions, exposing themselves to serious complications and death.

(i) The spousal consultation requirements of Section 3.4 interferes with the privacy of the physician-patient relationship, subjects my patients to unnecessary stress and will encourage my patients to seek pregnancy terminations from unlicensed persons, thereby exposing themselves to increased risks of complications and death.

(j) Section 3.5 requiring me to distribute State propaganda includes material on gestational age that is irrelevant and confusing to nonphysicians and will needlessly cause great anxiety and stress for my patients. This required information will cause some of my patients, to delay their pregnancy termination,

which will increase the risks associated with the procedure and may cause them to delay beyond the point where the procedure can be performed, causing them to have an unwanted child and subjecting them to greater risks of childbirth.

(k) Section 6(3) prohibiting experimentation on aborted fetuses is confusing because of the meaning of experimentation which is not a usual medical term, may include weighing, photographing, and measuring the fetus and using these specifications for clinical review and scientific publication, and is contrary to usual custom in the profession.

(l) Section 6(6) requiring that a physician offer a patient the option of an anesthetic for fetal pain is medically meaningless and contrary to accepted medical practice which dictates that local anesthetics are less hazardous than

general anesthetics. General anesthetics when administered to the patient will circulate in the fetus.

(m) Section 9, banning the saline amniocentesis procedure unless certified as necessary interferes with my exercise of best clinical judgment because it is contrary to medical findings, burdensome in its reporting requirements and intimidating due to the criminal penalties involved.

(n) The reporting requirements of Section 10 are harassing and burdensome, due to the sheer number of reports and the complex nature of the information required, the criminal penalties involved and the release to the general public of the number and type of pregnancy terminations I do.

/S/
LOUIS GERALD KEITH, M.D.

[Notarized 10/30/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Joel M. Flaum

(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

DAVID ZBARAZ, M.D.

Affiant, DAVID ZBARAZ, M.D., being duly sworn on oath, deposes and states as follows:

1. I received my M.D. degree from the University of Illinois College of Medicine in 1965. I am a registered and licensed physician in the State of licensed physician in the State of Illinois and an actively engaged in the practice of obstetrics and gynecology. I am currently on the staff of Michael Reese Hospital, Chicago, Illinois, and a clinical professor of obstetrics and gynecol-

ogy at the University of Chicago. I am a Diplomate of the American Board of Obstetrics and Gynecology and a Fellow of the American College of Obstetricians and Gynecologists. I am a member of the American Medical Association, the Illinois State Medical Society and the Chicago Medical Society.

2. I share a practice with five other obstetrician/gynecologists. My practice is approximately fifty percent obstetrics, of which approximately three percent or a minimum of three patients per week are pregnancy terminations.

3. Based upon my knowledge and experience, it is my professional opinion that:

(a) the requirement of section 3, which dictates that the physician who performs the procedure must be the physician who consulted with the patient 24

hours earlier is arbitrary and burdensome. This requirement subordinates patient care to the requirements of form, is unrelated to the health needs of the patient and is incompatible with rotating schedules of my clinical group, which is structured to provide timely service to the unpredictable demands of patients giving birth. All the obstetrical patients in my group are accustomed to this rotating schedule of care by the various physicians in my practice. Also, a 24-hour waiting period unjustifiably increases the cost of pregnancy termination, causes unnecessary and harmful stress, and is medically unjustifiable and punitive.

(b) Many, if not most of my patients, are accompanied by spouse, parents, other relatives or friends when I conduct pre-abortion examinations and consultations. But when against the

wishes of my patients, required parental and spousal consultation [§§3.3, 3.4] destroys the privacy and confidentiality of the physician-patient relationship, destroys the patient's trust in her physician, is against the medical interests of some patients, and causes harmful stress. Some patients will avoid mandatory consultation by seeking criminal abortions thereby subjecting themselves to much greater risks of complications and death.

(c) Section 3, requiring me to state to my patients and third parties the gestational age of the fetus and to distribute the State of Illinois literature detailing the probable anatomical and physiological characteristics of the fetus in cruel and punitive toward my patients, causes harmful stress, does not promote maternal health and may be detrimental to maternal health.

The rigid disclosure requirements in section 3(2) are misleading, cruel and punitive to my patients, medically unjustified, unrelated to informed consent, and violative of the privacy of the physician-patient relationship.

(e) Section 6(6) which requires me to offer a patient medication for relief of "fetal pain" is medically meaningless, confusing, medically unjustified, and contraindicated, causing cruel and harmful stress to my patients.

(f) The definition of abortifacient in section 2(10) is medically unjustified, and includes the IUD (intrauterine device--a widely used form of birth control), and menstrual extraction. Furthermore, section 11(e), which is based on section 2(10), requires [me] to describe the above medical methods as abortifacients to my patients, which is cruel,

misleading, unnecessary, and violates the privacy of the physician-patient relationship. Some of my patients will be misled into rejecting appropriate birth control and pregnancy prevention methods, causing unwanted pregnancies.

(g) Section 2(2) defining viability is erroneous and confusing and interferes with the exercise of my medical judgment. This vague definition, used as the basis for the standard of care provision of sections 6(4) and 6(1) exposes me to criminal prosecution without standards and seriously deters me from performing second trimester pregnancy terminations.

(h) Section 6(3) prohibits the accepted medical practice of testing for genetic complications in aborted fetuses to confirm in-utero diagnosis, assist the future family-planning of the patient, and retards further medical knowledge and

is medically unjustifiable.

(i) The reporting scheme of SB47 is so burdensome that it operates as a penalty on me for performing abortions.

(j) SB47 unnecessarily interferes with the exercise of my judgment, violates my responsibility to my patients, violates my sense of personal ethics, and interferes with my right to free speech. I would not be able to perform pregnancy terminations in the State of Illinois under this Act.

4. I find the "medical judgment", I am required to make under Section 3.1 of SB47 confusing, failing to provide me any guidance as to what medical criteria or other standards which I am required to adhere to in deciding to perform pregnancy terminations. I perform first trimester abortions and in the past have performed such abortions at the request of the

patients, or abortions which might be considered "elective abortions." Section 3.1 would appear to preclude me form performing such abortions. I also perform second trimester abortions and in the past have performed them because of ascertainable genetic defects in the fetus. Section 3.1 would seem to preclude me from performing such second trimester abortions.

/S/
DAVID ZBARAZ, M.D.

[Notarized 10/31/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Joel M. Flaum

(Title omitted in printing.)

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

AFFIDAVIT

HECTOR N. ZEVALLOS, M.D.

Affiant, HECTOR N. ZEVALLOS, M.D., being duly sworn upon his oath, deposes and states as follows:

1. I am a plaintiff in the foregoing encaptioned cause, one of seven representatives of the class of physician-plaintiffs certified by the District Court, and Medical Director of plaintiff-facility, THE HOPE CLINIC FOR WOMEN, LTD.

2. Since the entering by the District Court of its Preliminary Injunction in this cause on November 16, 1979, as amended by orders dated November 19, 1979,

four days have elapsed.

3. The actual experience of myself and plaintiff THE HOPE CLINIC FOR WOMEN, LTD. in attempting to treat medically our women patients, while remaining in compliance with the challenged Act and the District Court's orders, has been near impossible.

4. Many portions of the challenged Act, while seemingly benign upon their face, have seriously prevented and impaired the performance of first trimester abortions in Illinois, in a manner totally inconsistent with the delivery of such services throughout the remainder of the United States.

5. I have read the Affidavits previously filed with the District Court in related cause No. 79C4541 by other physicians; and their predictions as to the consequences of the challenged Act upon

the practice of medicine and their patients, have come to pass.

6. The requirement of Section 3.2 mandating a 24 hour delay and the giving of certain information by the performing physician are directly adverse to the best health interests of my patients. They are contrary to the traditional doctor-patient relationship and they are contrary to present custom of medical practice in the United States.

7. Because abortions are not performed on a daily basis at plaintiff THE HOPE CLINIC FOR WOMEN, LTD. and other outpatient first trimester abortion facilities in Illinois, and because women frequently travel more than 100 miles to reach such a facility; the mandated delay becomes and presently is an insurmountable barrier for many women.

8. The actual number of women able

to receive abortions by me and at THE HOPE CLINIC FOR WOMEN, LTD. has fallen drastically since the District Court's order of November 16, 1979, removing the stay as to certain portions of the challenged Act. Normally 60 patients would have been accomodated during that period. Due to the direct impositions imposed by the challenged Act, that number was reduced to 37, a decrease of 38%.

9. I am personally aware of many women who have been forced by the challenged Act to leave their homes, families, bases of emotional support and the physician of their choice and to travel to other states in order to receive an abortion.

10. The decision to terminate a pregnancy is not lightly made by a woman. Once a woman reaches the stage of seeking medical assistance, she has in the vast

majority of cases already expended considerable energy and time in arriving at her choice. A mandated delay serves no beneficial purpose and, in fact, by reason of the circumstance above described and by reason of the delay itself, her anxiety and stress are significantly increased. It is axiomatic that this increased anxiety and stress adversely impact the risks to her of mortality and morbidity from the abortion. Anxiety and stress similarly adversely impact any surgical procedure.

11. The requirement that the performing physician relate the information prescribed in Section 3.2 locks the physician into a straitjacket in his/her medical practice and prohibits the delegation of information giving to nurses or other adequately trained. Such delegation of information giving is commonplace medical practice, even in surgical procedures

of much greater risk and severity, that [sic] the minor surgical procedure of first trimester abortion.

12. This requirement also prohibits the delegation of the information giving to another licensed physician. Nowhere in medical practice does such an imposition exists. Because of the nature of out-patient abortion facilities throughout the United States, this requirement becomes draconian. Such facilities, including THE HOPE CLINIC FOR WOMEN, LTD., are usually staffed by more than one physician, each working at the facility on a part-time basis, usually one or two days a week. By requiring the same physician who performs the abortion to be the one who at least 24 hours prior thereto to have given the required information, the delays produced are frequently of four or more days duration.

13. I know of no rational reason to believe that a nonphysician could not convey the desired information, as well as the performing physician. In fact, the experience at THE HOPE CLINIC FOR WOMEN, LTD. and my experience is trained nurses perform this function better, due to their counseling skills, experience and the ability to spend greater time with each patient. I believe that another physician could give the information to a patient upon whom I might subsequently perform the abortion, as well as I.

14. The giving by rote of mandated information under Section 3.2 is the very antithesis of the practice of medicine. No exception whatever is provided for the individual patient's needs. No allowance is provided for those cases where I believe in my medical judgment that the giving of such information in [sic]

contraindicated and is not in the best health interests of my patient.

15. Mortality and morbidity from abortion doubles approximately every two weeks. Every delay of three to four days increases the risks to the patient by 25%.

16. The requirement of Section 11(e) of furnishing the name and identity of abortion patients to the State of Illinois, whenever post-procedure ca is given, is a direct breach of the confidentiality of the doctor-patient relationship. I consider it my duty to inform each patient of my statutory obligation to furnish her name to the State, merely because I have treated her for an abortion she may have received from someone else.

17. I have no doubts that such breach of confidentiality will dissuade countless patients from seeking and

receiving the post-surgical care they may desparately need. I would be remiss to treat such a patient without first informing her of my legal duty to report her identity to the State.

18. I believe there is no reasonable manner to comply with the challenged Act and the District Court's present orders, so as to accomodate the existing medical needs in the medical community I serve, in a manner consistent with a high level of medical competence and expertise, and in a manner affordable and accessible to my present patient population.

19. The impact of the challenged Act as above described upon the general abortion patient population as a whole, has additional and disproportionate impact upon the economically disadvantaged, the young, the rural and the minority woman, by reason of her greater lack of

sophistication and resources to deal with the problem pregnancy.

/S/
HECTOR N. ZEVALLOS, M.D.

[Notarized 11/20/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Joel M. Flaum

(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

JOSEPH T. GALLAGHER, M.D.

Affiant, Joseph T. Gallagher, M.D., being duly sworn on oath, deposes and states as follows:

1. I received my M.D. degree from the Stritch School of Medicine, Loyola University in 1953. I am a registered and licensed physician in the state of Illinois and am actively engaged in the practice of obstetrics and gynecology. I am currently on the staff of Little Company of Mary Hospital, Evergreen Park, Illinois, where I am a Senior Attending Staff Member and Consultant in Obstetrics

and Gynecology. I am a Diplomate of the American Board of Obstetrics and Gynecology and a Fellow of the American College of Obstetrics and Gynecologists. I am a member of the American Medical Association, the Illinois State Medical Society, and the Chicago Medical Society.

2. I am actively engaged in the practice of Obstetrics and Gynecology. My practice is approximately seventy-five percent obstetrics, and I am currently treating approximately 140 pregnant women and their unborn children.

3. Based upon my knowledge and experience it is my professional opinion that:

(a) The requirements of Section 2(2) which defines viability as "a reasonable likelihood of more than momentary survival with or without artificial life support" is consonant

with standard definitions of viability in the medical literature and would be a clear and concise guideline for practitioners of obstetrics.

(b) Section 2(1), which defines the first trimester as "the first twelve weeks of gestation commencing with ovulation", is a definition supportable from medical literature and common usage and would be a definition acceptable to practitioners of obstetrics.

(c) Section 3.1(A), which permits [sic-prohibits] any unnecessary abortion, is not confusing. It reflects a proper distinction between necessary and unnecessary treatment. No treatment should be rendered if it is not deemed necessary.

(d) Section 3.1(B), which requires that the patient actually meet and be counseled by the physician who is to

perform the abortion in advance, is perfectly reasonable in non-emergency situations and in accord with standard medical practice.

(e) Section 3.2, which requires certain circumstances surrounding the patient's giving of informed consent, is not unreasonable and, in fact, differs very little from the basic philosophy of insuring informed consent to any medical or surgical procedure.

(f) Regarding the use of "medical emergency" in various sections of the Law, practioners [sic] of medicine must make daily judgements as to whether or not surgery is "emergency" and as to whether or not patient admissions to the hospital are "emergency admissions". Therefore, the use of the term "medical emergency" would not be confusing or

ambiguous for the practicing obstetrician.

/S/
JOSEPH T. GALLAGHER, M.D.

[Notarized 11/7/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Joel M. Flaum

(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

THOMAS G. GORMAN, M.D.

Affiant, Thomas G. Gorman, M.D., being duly sworn on oath, deposes and states as follows:

1. I received my M.D. degree from the Catholic University of Louvain, Belgium in 1955. I am a registered and licensed physician in the State of Illinois and am actively engaged in the practice of obstetrics and gynecology. I am currently on the Staff of Little Company of Mary Hospital, Evergreen Park, Illinois. I am a Diplomate of the American Board of Obstetrics and Gynecology and a

Fellow of the American College of Obstetrics and Gynecologists [sic]. I am a member of the American Medical Association, the Illinois State Medical Association, and the Chicago Medical Society.

2. I am actively engaged in the private practice of Obstetrics and Gynecology. My practice is approximately seventy-five percent obstetrics, and I am currently treating approximately 85 pregnant women and their unborn children.

3. Based upon my knowledge and experience, it is my professional opinion that:

(a) the requirements of Section 2(2) which defines viability as "a reasonable likelihood of more than momentary survival with or without artificial life support" is consonant with standard definitions of viability in the medical literature and would be a clear and concise

guideline for practitioners of obstetrics.

(b) Section 2(1), which defines the first trimester as "the first twelve weeks of gestation commencing with ovulation", is a definition supportable from medical literature and common usage and would be a definition acceptable to practitioners of obstetrics.

(c) Section 3.1(A), which permits [sic-prohibits] any unnecessary abortion, is not confusing. It reflects a proper distinction between necessary and unnecessary treatment. No treatment should be rendered if it is not deemed necessary.

(d) Section 3.1(B), which requires that the patient actually meet and be counseled by the physician who is to perform the abortion in advance, is perfectly reasonable in non-emergency situations and in accord with standard medical

practice.

(e) Section 3.2, which requires certain circumstances surrounding the patient's giving of informed consent, is not unreasonable and, in fact, differs very little from the basic philosophy of insuring informed consent to any medical or surgical procedure.

(f) Regarding the use of "medical emergency" in varous sections of the Law, practioners of medicine must make daily judgements as to whether or not surgery is "emergency" and as to whether or not patient admissions to the hospital are "emergency admissions". Therefore, the use of the term "medical emergency" would not be confusing or ambiguous for the practicing obstetrician.

/S/
THOMAS G. GORMAN, M.D.

[Notarized 11/7/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Joel M. Flaum

(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

MARTIN MOTEW, M.D.

Affiant, MARTIN MOTEW, M.D., being duly sworn on oath, deposes and states as follows:

1. I received my M.D. degree from the Chicago Medical School in 1967. I am a registered and licensed physician in the State of Illinois and am actively engaged in the practice of obstetrics and gynecology. I am currently a clinical professor of obstetrics and gynecology at the University of Chicago. I am a Diplomate of the American Board of Obstetrics and Gyncecolgy, and a Fellow

of the American College of Obstetricians and Gynecologists. I am a member of the American Medical Association, the Illinois State Medical Society, and the Chicago Medical Society.

2. I share a practice with five other obstetrician/gynecologists. My practice is approximately fifty percent obstetrics, of which approximately three percent or a minimum of three patients per week are pregnancy terminations.

3. In connection with my obstetrical and gynecological practice I conduct amniocentesis on pregnant patients for purposes of determining whether the embryo or fetus has any genetic defects. Examples of the genetic defects which can be determined through amniocentesis are Tay-Sachs, and Down's Syndrome (mongoloidism). If the results of the amniocentesis disclose such a genetic defect and

the woman wishes an abortion, I perform a second trimester abortion upon her, using either prostaglandin induction or saline induction procedure.

4. Based upon my knowledge and experience, it is my professional opinion that:

(a) the requirement of Section 3, which dictates that the physician who performs the procedure must be the physician who consulted with the patient 24 hours earier is arbitrary and burdensome. This requirement subordinates patient care to the requirement of form, is unrelated to the health needs of the patient and is incompatible with rotating schedule of my clinical group, which is structured to provide timely service to the unpredictable demands of patients

giving birth. All the obstetrical patients in my group are accustomed to this rotating schedule of care by the various physicians in my practice. Also, a 24-hour waiting period unjustifiably increases the cost of pregnancy termination, causes unnecessary and harmful stress, and is medically unjustifiable and punitive.

(b) Many, if not most of my patients, are accompanied by spouse parents, other relatives or friends when I conduct pre-abortion examinations and consultations. But when against the wishes of my patients, required parental and spousal consultation [§§3.3, 3.4] destroys the privacy and confidentiality of the physician-patient relationship, destroys the patient's trust in her

physician, is against the medical interests of some patients, and causes harmful stress. Some patients will avoid mandatory consultation by seeking criminal abortions thereby subjecting themselves to much greater risks of complications and death.

(c) Section 3.5 requiring me to state to my patients and third parties the gestational age of the fetus and to distribute the State of Illinois literature detailing the probable anatomical and physiological characteristics of the fetus is cruel and punitive toward my patients, causes harmful stress, does not promote maternal health and may be detrimental to maternal health.

(d) The rigid disclosure requirements in Section 3.2 are misleading, cruel

and punitive to my patients, medically unjustified, unrelated to informed consent, and violative of the privacy of the physician-patient relationship.

(e) Section 6(6) which requires me to offer a patient medication for relief of "fetal pain" is medically meaningless, confusing, medically unjustified, and contraindicated, causing cruel and harmful stress to my patients.

(f) The definition of abortifacient in Section 2(10) is medically unjustified, and includes the IUD (Intrauterine Device) -- a widely used form of birth control), and menstrual extraction. Furthermore, Section 11(d), which is based on Section 2(10), requires me to describe the above medical methods

as abortifacients to my patients, which is cruel, misleading, unnecessary, and violates the privacy of the physician-patient relationship. Some of my patients will be mislead into rejecting appropriate birth control and pregnancy prevention methods, causing unwanted pregnancies.

(g) Section 2(2) defining viability is erroneous and confusing and interferes with the exercise of my medical judgment. This vague definition, used as the basis for the standard of care provision of Sections 6(4) and 6(1) exposes me to criminal prosecution without standards and seriously deters me from performing second trimester pregnancy terminations.

(h) Section 6(3) prohibits the accepted

medical practice of testing for genetic complications in aborted fetuses to confirm in-utero diagnosis, assist the future family-planning of the patient, and retards further medical knowledge and is medically unjustifiable.

(i) The reporting scheme of SB47 is so burdensome that it operates as a penalty on me for performing abortions.

(j) SB47 unnecessarily interferes with the exercise of my judgment, violates my responsibility to my patients, violats my sense of personal ethics, and interferes with my right to free speech. I would not be able to perform pregnancy terminations in the State of Illinois under this Act.

4. I find the "medical judgment", I

am required to make under Section 3.1 of SB47 confusing, failing to provide me any guidance as to what medical criteria or other standards which I am required to adhere to in deciding to perform pregnancy terminations. I perform first trimester abortions and in the past have performed such abortions at the request of the patients, or abortions which might be considered "elective abortion." Section 3.1 would appear to preclude me from performing such abortions. I also perform second trimester abortions and in the past have performed them because of ascertainable genetic defects in the fetus. Section 3.1 would seem to preclude me from performing second trimester abortions.

5. A pregnancy test is not always required in order to make a diagnosis of pregnancy. After approximately ___ weeks

of pregnancy, pregnancy can be confirmed by an internal pelvic examination.

6. The standards of care toward the fetus required by Sections 6(1) and 6(4) are confusing, use medically meaningless terminology and do not present me with a clear understanding of what conduct on my part would be considered criminal.

7. The provision of Section 6(2) subjects me to possible prosecution for murder if I fail to take measures to save a nonviable fetus. This is true because the section equates live birth with a viable birth. Medically, live birth is not the equivalent to viability, and can include such minimal life signs as a pulsating umbilical cord.

8. Section 11(e), requires me to report the name and diagnosis of any patient suffering complications to the Department of Public Health. This

provision is an unjustified violation of the confidentiality of the physician-patient relationship. Also, because the word "complication" is undefined, the only way that I can protect myself from possible prosecution is to report a limitless number of conditions the woman may be suffering, even I'm not sure the condition results from the abortion procedure. In essence, I would have to submit all post-operative histories to the Department of Public Health.

9. Section 6(3) prohibits autopsies or confirmation of genetic defects diagnosed by amniocentesis or feteoscopy. These tests are conducted under my supervision and direction on fetal tissue after abortions which have been performed as a result of the diagnosis of defect. This type of testing is necessary in order that I may consult and advise my

patients with respect to their future family-planning.

10. I have done research in perinatal medicine, including published papers on premature labor, fetal monitoring, and ultrasonography. This research has involved my use from time to time of sampling of fetal material in utero. Section 6(3) would preclude me from conducting this kind of research.

Further affiant sayeth not.

/S/
MARTIN MOTEW, M.D.

[Notarized 11/8/79]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

AFFIDAVIT OF DIANA SHARK

I, Dianna Shark, a resident of the State of Illinois, having been first duly sworn, state that if called upon to testify in this case, I would testify as follows:

1. I am 33 years old and believe in family planning.

2. I also believe that there is a big difference between drugs or devices which act to prevent conception/fertilization and those which terminate a pregnancy after that point in time. I say this because I believe that a human being exists from the point of conception forward. I believe that any drug or device which prevents childbirth after the point

of conception acts as an abortifacient and ends the life of a human being.

3. I, therefore, would not want to use an abortifacient. Information concerning the abortifacient character of any prescription should be required so that I can exercise my right to choose between abortifacients and other methods of family planning.

Respectfully submitted,

/S/
Dianna Shark

[Notarized 6/13/82]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

AFFIDAVIT OF MARY CHRISTINE GASPAR

I, Mary Christine Gaspar, a resident of the State of Illinois, having been first duly sworn, state that if called upon to testify in this case, I would testify as follows:

1. I am of childbearing age.

2. I am of the opinion that an individual human being exists from conception until death. I also believe that it is morally wrong to end the life of an innocent human being no matter how young it is.

3. I do not, however, think that family planning through the use of contraceptives is inappropriate since it does not terminate the life of a human being.

It merely prevents that life from beginning.

4. Because of my beliefs and my desire to plan my family in a manner which would not conflict with those beliefs, I feel that it is necessary to know the effect of drugs or instruments which are commonly used for family planning. This would enable me to choose between those which act only as contraceptives and those which act as abortifacients.

5. Therefore, I think that it is imperative that anyone prescribing an abortifacient inform me of its abortifacient nature.

Respectfully submitted,

/S/
Mary Christine Gaspar

[Notarized 6/13/82]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

AFFIDAVIT OF DEBRA ELROD EVANS

I, Debra Elrod Evans, a resident of the State of Illinois, having been first duly sworn, state that if called upon to testify in this case, I would testify as follows:

1. I am 29 years old.

2. I am not opposed to taking contraceptives as a means of family planning.

3. Because I believe that life begins at conception and that it is morally wrong to end a life, I would not knowingly use any instrument or drug which is known to cause the death of a fertilized egg--either through direct action on that egg or through prevention of its implantation.

4. I would expect any person prescribing an instrument or drug which acts to cause the death of a fertilized egg to inform me of its abortifacient nature. Without such information, I would not be able to exercise my choice of family planning according to my beliefs as set forth above.

Respectfully submitted,

/S/
Debra Elrod Evans

[Notarized 6/13/82]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

JASPER F. WILLIAMS, M.D

Jasper F. Williams, M.D. being duly sworn, deposes and states as follows:

1. I am a board-certified Obstetrician-Gynecologist. I practice in the State of Illinois. A copy of my curriculum vitae is appended to this affidavit.

2. I have read and am familiar with Ill. Rev. Stat. 38, secs. 81-21 to 81-35 (1979), the Illinois Abortion Law of 1975, as amended. The statements in this affidavit are based on my medical experience and knowledge and best medical judgment.

3. I have read and understood

section 2(2) (definition of viability). This section is fully intelligible to a physician in the usual course of his practice. Its use of the phrase "more than momentary" to designate the length of time that the fetus must survive in order to be classified as "viable" is comprehensible and logical. Indeed, it is clearer than the term "sustained" survival. It is easier to judge whether or not a fetus would be born, take a few labored breaths and then expire--that is, live only "for a moment"--than it would be to judge whether or not a fetus could survive for a "sustained" period of time. "Sustained survival" is an open-ended term that could conceivably mean that the fetus is simply capable of surviving beyond the first critical moments of extra-uterine life, or could conceivably mean that it must be certain that the fetus can survive

to adulthood if born. The later meaning of "sustained survival" would be medically incongrous [sic] since, at the margins of viability, it is not possible to conclude that a fetus can be "sustained" to adulthood. Hence, it would logically follow that "sustained" survival means survival beyond the first critical moments of existence--"more than momentary survival" --which is precisely what section 2(2) states directly and clearly. It must, therefore, be concluded that "more than momentary" survival and "sustained" survival mean the same thing, but that the former term states the issue more clearly and directly than the later [sic] because a laborious analytic process is not necessary to discern its meaning.

4. I have read and undestood [sic] sections 2(2), 2(6), 2(8) and 2(10) (definitions of abortion, fetus, human

being, unborn child, and abortifacient). At all stages, from fertilization until death, an individual organism of the species homo sapiens is "human." Such an organism is "in being" so long as it lives. It is, therefore, logically, scientifically, and medically accurate to denominate such an organism a "human being," and the med ical literature supports this reasoning and conclusion. See G. D. Dodds, The Essentials of Human Embryology 2 (2nd ed. 1964); M. S. Gilbert, Biography of the Unborn 2, 5 (1938); J. C. Heisler, A Textbook of Embryology for Students of Medicine 38 (2nd ed. 1901); I. N. Quimby, Introduction to Medical Jurisprudence: Address Delivered by the Chairman of the Section of Medical Jurisprudence at the 38th Annual Meeting of the AMA, June 10, 1887, 9 JAMA 161-166 (1887); J. M. McMurrich,

The Development of the Human Body: A Manual of Human Embryology 31 (7th ed.); W. J. Hamilton, et al, Human Embryology (Prenatal Development of Form and Function) 1 (1945); L. B. Arey, Developmental Anatomy ch. 2 & 6 (6th ed. 1954); A. Ingleman-Sundberg and C. Wirsen, A Child is Born: The Drama of Life Before Birth (1965); B. M. Patten, Human Embryology ch. 7 (3d ed. 1968); R. Rugh and L. B. Shettles, From Conception to Birth: The Drama of Life's Beginnings (1971); B. M. Patten, Human Embryology 41-42 (3d ed. 1968); C. B. Arey, Developmental Anatomy: A Textbook and Laboratory Manual of Embryology 55 (1965); J. Langmann, Medical Embryology 3 (2nd ed. 1969); H. Gordon, Genetical, Social and Medical Aspects of Abortion, 1968 South African Med. J. 721-30; L. B. Shettles, Ovum Humanum 60 (1960); J. Davies, Human

Developmental Anatomy 3 (1963).

5. I have read and understood section 3.1 (physician consultation). It is standard medical practice for the physician individually to consult with a patient prior to performing surgery upon him or her, except in a medical emergency.

6. I have read and understood sections 6(2) (infanticide provision), 6(3) (fetal experimentation), and 12 (pathology reporting), which employ the terms "aborted alive," "live birth," and "dead fetus." Obviously, a child is "live born" regardless of whether he or she has been born alive during the course of an abortion or through natural processes. The manner of birth cannot alter the fact that a child has been born alive. Therefore, "live birth" and "aborted alive" are equivalent when applied to describe the physical status of a child. I cannot

imagine how a physician with any professional integrity whatever could assert that either "aborted alive" or "live birth" is ambiguous. These terms both obviously and self-evidently describe a child who is alive. Moreover, they obviously and self-evidently describe a child born with <u>any</u> life signs, whether "minimal" or not. I cannot understand where any controversy can logically exist in this regard: a child cannot be "dead" if he or she has life signs, whether minimal or not. How can a child be "dead" when he or she is, by definition, alive? "Live birth" is not ambiguous. The physician, in the ordinary course of his professional practice, must obviously know when a child is born alive and is required to make fetal death reports pursuant to Ill. Rev. Stat. Ch. 111½, sec. 73-1(b) 1979:

> "Live birth" means the complete explusion or extraction from its mother of a product of human conception irrespective of the duration of pregnancy, which after such separation breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.

This standard could hardly be clearer--it describes a child born alive (whether by abortion or through normal processes) and obviously excludes any consideration of whether or not the life signs it delineates are "minimal."

7. I have read and understood section 9 (saline abortion restriction). It is apparent that the use of prostaglandin as a method of abortion poses a greater risk of morbidity--a greater risk to maternal <u>health</u>--than the use of saline.

Grimes & Cates, Jr., The Comparative Efficacy and Safety of Intraamniotic Prostaglandin F2alpha and Hypertonic Saline for Second Trimester Abortion, 22 J. Reprod. Med. 248, 253 (attached hereto). It is to be noted, however, that the supposed "health risks" of prostaglandin involve relatively minor matters: nausea, vomiting, diarrhea, fever, and "live birth." Id. at 252-253. (It is impossible to see how the "live birth" can legitimately be called a maternal "health risk" from prostaglandin.) But it is clear that the use of hypertonic saline as a method of abortion poses a greater risk to maternal life than does prostaglandin. Id. at 252. See also abortion-related maternal morbidity/mortality data released by the United States Center for Disease Control (attached hereto).

8. I have read and understood section 6(3) (fetal experimentation), which states that there shall "be no exploitation of or experimentation with" an aborted fetus or tissue. This provision would obviously not preclude testing of the fetus or tissue. "Experimentation" denotes the use of the fetus or tissue to develop a new body of scientific knowledge. "Exploitation" denotes use of the fetus for some commercial or scientifically irrelevant purpose. "Testing" does not fall within either of these categories as the term is employed by the medical profession.

Respectfully submitted,

/S/
JASPER F. WILLIAMS, M.D.

[Notarized 7/8/82]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

ADOPTION OF MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF OF INTERVENING DEFENDANTS.

Comes now Defendant RICHARD M. DALEY, State's Attorney of Cook County, Illinois, by ROBERT J. TONOS, Assistant State's Attorney, and states as follows:

Whereas the duties imposed upon Defendant DALEY by Ill. Rev. Stat. 1981, ch. 14, par. 5, place him as the State's Attorney of Cook County, Illinois, in pari causa with the intervening Defendants with respect to the disposition of the legal issues remaining in the instant lawsuit.

Therefore, Defendant DALEY, pursuant to Rule 10(c) of the Rules of Civil Procedure, adopts as his own the Intervening

Defendants' contemporaneously filed Supplemental Brief in Support of Intervening Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment.

RICHARD M. DALEY
State's Attorney of Cook County

By: /S/
Robert J. Tonos
Assistant State's Attorney
500 Richard J. Daley Center
Chicago, Illinois 60602
443-4553

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

ADOPTION OF SUPPLEMENTAL BRIEF
OF INTERVENING DEFENDANTS

NOW COME defendants NEIL F. HARTIGAN, Attorney General of Illinois and William L. Kempiners, Director, Department of Public Health, State of Illinois, and pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, adopt the Intervening-Defendants Supplemental Brief in Support of their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

/S/

KATHLEEN KREISEL
Assistant Attorney General
(of Counsel)
160 N. LaSalle, Room 850
Chicago, IL 60601
312/793-3700

NEIL F. HARTIGAN
Attorney General of Illinois

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALLAN G. CHARLES, M.D., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4541
BERNARD CAREY, et al.,	)	
Defendants.	)	
THE HOPE CLINIC FOR WOMEN, LTD., et al.,	)	
Plaintiffs,	)	
v.	)	No. 79 C 4548
TYRONE C. FAHNER, et al.,	)	
Defendants.	)	

October 14, 1983
As amended November 2, 1983

MEMORANDUM OPINION

KOCORAS, District Judge:

This matter comes before the Court on the parties' cross motions for summary judgment. Plaintiffs seek entry of a permanent injunction against the

enforcement of the Illinois Abortion Law of 1975, as amended,[1] on the grounds that the legislation is unconstitutional. Numerous sections of the legislation have already been preliminarily enjoined as a result of orders issued by Judge Flaum (Memorandum Opinion, November 16, 1979), the Seventh Circuit Court of Appeals (Charles v. Carey, 627 F.2d 772 (7th Cir. 1980), and by this Court Charles v. Carey, 579 F.Supp. 377 (N.D.Ill.1983). In this opinion, the constitutionality of each section shall be discussed sequentially.[2]

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1. The legislation, commonly known as "S.B. 47," is codified at Ill.Ann. Stat. ch. 38 §§81-11 to 81-34. (Smith-Hurd Supp.1982).

2. The applicable Constitutional standards upon which my decision must be based were discussed in my earlier opinion. 579 F.Supp. at 378-379. As a general matter, because this legislation has already been subject to extensive judicial scrutiny, I shall not attempt to summarize the bases for previous holdings. Rather, the earlier opinions will be referenced.

Section 1 of the legislation is the Preamble. Despite the clear holding of the Supreme Court in Roe v. Wade,[3] and reaffirmed in City of Akron v. Akron Center for Reproductive Health,[4] that "a State may not adopt one theory of when life begins to justify its regulation of abortions,"[5] the Preamble in the instant statute arguably attempts to do just that. It declares the General Assembly's view "that the unborn child is a human being from the time of conception and is . . . entitled to the right of life from conception." However, because the Preamble also contains language which states that the legislature intended "to reasonably

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3. 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

4. ____ U.S. ____, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983).

5. Akron, ___ U.S. at ___, 103 S.Ct. at 2500. See also Roe v. Wade, 410 U.S. at 159-162, 93 S.Ct. at 729-731.

regulate abortion in conformance with the decisions of the United States Supreme Court [in Roe v. Wade and its companion cases]" (emphasis supplied), the Seventh Circuit has held that the Preamble does not express an unlawful purpose, when read as a whole. Charles v. Carey, 627 F.2d at 779. Most important, because the Preamble is largely rhetorical and effectively has little impact on the substantive provisions of this Act,[6] it does not unconstitutionally burden a woman's protected interest in obtaining an abortion. Accordingly, Section 1 shall not be permanently enjoined.

In contrast, I find that certain portions of Section 2, the definitional section, do have an impact upon the

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6. See Wynn v. Scott, 449 F.Supp. 1302, 1314-1315 n.9 (N.D.Ill.1978), aff'd sub nom. Wynn v. Carey, 599 F.2d 193 (7th Cir.1979).

substantive provisions of the legislation and therefore do burden a woman's choice regarding an abortion. Thus, for the reasons set forth in the earlier opinions by the Seventh Circuit[7] and this Court,[8] a permanent injunction shall issue against Sections 2(8), 2(9), and 2(10).

[1] Section 2(2) defining viability was recently amended to replace the clause "more than momentary" with the word "sustained".[9] This change removes the objections found by Judge Flaum earlier, and

7. 627 F.2d at 789. See also discussion infra.

8. 579 F.Supp. at 379-380.

9. Illinois Senate Bill 666 became law on September 17, 1983. It amends Section 2(2) of the present Act such that "'viability" means that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support." Thus, the word "sustained" replaces the clause "more than momentary."

renders the definition constitutional under Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed2d 788 (1976). The preliminary injunction entered as to Section 2(2) is therefore dissolved and no permanent injunction shall issue. The remaining portions of Section 2 are not being challenged by plaintiffs at this time,[10] so they shall also stand.

Section 3.1(A) requires the doctor who is to perform an abortion to determine, for himself, that in his best clinical judgment the abortion is necessary. For the reasons set forth by this Court[11]

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10. See Plaintiffs' "Supplemental Memorandum In Support of Plaintiffs' Motion for Supplemental Judgment," July 29, 1983, Exh. A. In previous opinions, Section 2(6) defining "abortion" has been upheld. 627 F.2d at 788; 579 F.Supp. at 380.

11. 579 F.Supp. at 382-383.

and the Court of Appeals[12] in the earlier opinions, this subsection is constitutional and shall not be enjoined.

Section 3.1(B)(1)(a) sets forth certain requirements concerning a mandatory "consultation" between the woman and the doctor who is to perform her abortion. Defendants concede that it is an unconstitutional provision after Akron. A permanent injunction shall enter against it, for the reasons set forth in this Court's earlier opinion.[13]

[2] Section 3.1(B)(1)(b) requires the doctor performing the abortion to describe, on a form provided by the State, the "basis" of his best clinical judgment that the abortion is necessary. Although this Court sees no constitutional difficulty in requiring a physician to

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12. 627 F.2d at 786-87.

13. 579 F.Supp. at 383.

"certify" that the abortion was medically necessary,[14] to insist that a doctor "describe" the "basis" for that clinical judgment may unnecessarily interfere with both the confidentiality of the woman's abortion decision and the physician-patient consultation. The Akron Court made clear that neither of these two areas may be interfered with by the State during the first trimester, even by "minor regulations on the abortion procedure."[15] Further, it is unclear what need the State has for more detailed information than a certification. Accordingly, a permanent injunction shall issue as to

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14. This was the rationale relied upon by this Court in initially upholding Section 3.1(B)(1)(b).

15. ___ U.S. at ___, 103 S.Ct. at 2493.

as to Section 3.1(B)(1)(b).[16]

Section 3.2 was written to ensure that a woman gives voluntary and informed consent before an abortion is performed. Numerous subparts of this section have been preliminarily enjoined, and a permanent injunction shall issue against them for the reasons set forth in the earlier opinions.[17]

The only portion of Section 3.2 about which there continues to be a dispute is the first sentence of Section 3.2(A) which provides, simply: "No abortion shall be

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16. Because Section 3.1(B)(1)(a) and (B)(1)(b) have been enjoined, (B)(2) and (B)(3) are rendered meaningless. The permanent injunction shall therefore issue against Section 3.1(B) in its entirety.

17. 627 F.2d at 779-86; 579 F.Supp. at 381. Defendants now concede that all of Section 3.2 is unconstitutional, with the exception of the first sentence of Section 3.2(A), discussed infra. Sections 3.2(B) and (C) shall therefore also be enjoined.

performed except with the voluntary and informed consent of the woman upon whom the abortion is to be performed." Plaintiffs' primary argument is not directed towards the substance of this sentence, but rather, to any piecemeal treatment of the section.

[3] Form must not be elevated over substance by any court, especially when constitutional issues are raised. However, a case such as this also involves a statute, drafted with parts and subparts, and containing a severability clause. In such a situation, when constitutional infirmities are discovered, the court must struggle to effectuate the constitutional purpose of the legislature, to decide which clauses, subparts and sections must be enjoined, and to determine which of the remaining provisions may still be enforced.

The Supreme Court's decision in Akron teaches that effectuation of the legislature's constitutional purpose may be accomplished in several ways. First, the court may strike an entire undivided provision, on the grounds that severing only certain words or phrases would leave a remnant which the court could not be sure would have been enacted alone.[18] Alternatively, when a section has been carefully divided by the legislators into subsections, the court may find itself able to strike the unconstitutional subparts while leaving others, pursuant to

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18. See ____ U.S. at ____, 103 S.Ct. at 2504 n. 45.

a severability clause.[19] Finally, when an introductory clause is followed by subparts, each of which are individually affected by the introduction, and the former is found to be unconstitutional, then each of the underlying subparts must also be enjoined because they are necessarily infected by the introduction's infirmities. This is true even if the subparts, standing alone, would be sound.[20]

[4] In its earlier opinion, this Court followed the third approach outlined

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19. The informed consent section at issue in Akron had several subparts. Part (A) simply stated that informed consent was required, as §3.2(A) does in the instant case. Part (B) of the Akron statute specified those things which a physician was required to tell a patient to ensure that her consent was "informed" and therefore is substantially comparable to §3.2(A)(1) of the Illinois law. Although Part (A) was not stricken by the Court, Part (B) was. See ____ U.S. at ___, 103 S.Ct. at 2489 n. 5.

20. See ____ U.S. at ___, 103 S.Ct. at 2501 n. 37.

above to enjoin subsections 3.2(A)(1)(a)(i)-(iv). The overarching language in Section 3.2(A)(1)(a) was unconstitutional, so a preliminary injunction was issued against the subparts which followed it. In contrast, the disputed phrase in Section 3.2(A) does not follow any unconstitutional language; it is the first sentence of the section. It also sets forth a constitutional, and unquestionably wise requirement that informed consent be obtained.[21] Although the legislature clearly wanted "informed consent" to be defined as it had set forth in (a)(i)-(iv), I cannot believe that it would have retreated entirely from its desire to demand such consent once faced with this Court's ruling as to that definition. Accordingly, I find that the first sentence of

21. See 579 F.Supp. 380-381, citing the Seventh Circuit's opinion in this case and Akron.

Section 3.2(A) should not be enjoined.

Section 3.3 is the mandatory parental notice section. Judge Flaum enjoined the entire section and defendants now concede its unconstitutionality. A permanent injunction must issue against it.

Section 3.4 requires spousal notification. I agree with Judge Flaum that the section is overinclusive and therefore unconstitutional.[22] It must be permanently

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22. Memorandum Opinion, November 16, 1979, pp. 19-21.

enjoined.[23]

Sections 3.5 and 4, regarding information to be distributed to the woman, and the required use of hospitals for abortions after the first trimester, are

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23. The affidavits submitted by defendants do not alter my conclusion. Although this evidence is apparently submitted in an effort to establish that an abortion can create a greater than de minimus risk of harm to a woman's future procreative potential, this conclusion was specifically rejected by the District Court after extensive testimony in Scheinberg v. Smith, 550 F.Supp. 1112 (S.D.Fla. 1982). Moreover, even if defendants' factual assertions were accepted, their argument still fails to explain why either an estranged husband or one who has deserted his wife retains any constitutionally protected interest in being informed of the woman's intention to have an abortion. In Scheinberg v. Smith, 659 F.2d 476 (5th Cir.1981), the only case cited by defendants, the Court specifically relied upon the fact that the statute there did not require spousal notice if the couple was estranged. 659 F.2d at 486 ("given non-estrangement of the couple, as section 390.00(4)(6) posits..."). Thus, as Judge Flaum concluded, the section is unconstitutionally overbroad.

both conceded by defendants to be unconstitutional.[24] Both shall be permanently enjoined.

Section 5 concerns post-viability abortions. Judge Flaum issued a preliminary injunction against the entire section based upon his finding that the definition of "viability" was unconstitutional. The recent amendment to the definition removes that earlier objection and renders Section 5(2) clearly constitutional.[25] The preliminary injunction against this subpart is therefore dissolved. Section 5(3) is rendered

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24. See 579 F.Supp. at 382 (§3.5(1)); 627 F.2d at 784 (§3.5(2)); Akron, ___ U.S. at ___, 103 S.Ct. at 2493-2497 (hospitalization requirement). Section 4 is thus unconstitutional despite the amended definition of viability.

25. Plaintiffs concede this. See their "Memorandum in Support of Motion for Preliminary Injunction," November 9, 1979, p. 23.

meaningless because it references another provision which will be enjoined. See discussion of Section 10, infra.

Plaintiffs still insist, however, that Section 5(1) remains unconstitutional. They contend that this section, when read in conjunction with the definition of "viability" found in Section 2(2), creates an unconstitutional ambiguity of the type stricken in Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979).[26] In that case the Supreme

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26. In Colautti the statute provided, in pertinent part:

> Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill. . . . Id. at 380 n. 1, 99 S.Ct. at 678 n. 1.

Court found it unclear whether the statute in question "import[ed] a purely subjective standard, or whether it impose[d] a mixed subjective and objective standard." 439 U.S. at 391, 99 S.Ct. at 683.[27] Such an ambiguity was constitutionally impermissible, said the Court, especially in light of the criminal sanctions imposed for a violation of the section.

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27. As the Court explained:

> Apparently, the determination of whether the fetus "is viable" is to be based on the attending physician's "experience, judgment or professional competence," a subjective point of reference. But it is unclear whether the same phrase applies to the second triggering condition, that is, to "sufficient reason to believe that the fetus may be viable." In other words, it is ambiguous whether there must be "sufficient reason" from the perspective of the judgment, skill, and training of the attending physician, or "sufficient reason" from the perspective of a cross section of the medical community or a panel of experts.
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> Id. at 391, 99 S.Ct. at 683-684.

[5] Section 5(1) of the instant statute provides that "No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable on a form prescribed by the [Health] Department..." (emphasis supplied). Viability, in turn, is now defined under Section 2(2) as "that stage of fetal development when, in the medical judgment of the attending physician based on the particular facts of the case before him there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support." Plaintiffs believe that because Section 2(2) "already purportedly has the equivalent of the 'reasonable medical certainty'" language in Section 5(1), the latter can only be read

> as requiring, in essence that, prior to performing a non-therapeutic abortion, the physician must certify that with reasonable medical certainty (objective) there is in turn a reasonable likelihood that the fetus is not capable of [sustained][28] survival (arguendo, subjective).

"Plaintiffs' Joint Reply Memorandum in Support of Motion for Preliminary Injunction," November 9, 1979, p. 23.

I disagree with plaintiffs' reading of Section 2(2). I do not believe that it establishes an "arguendo subjective" standard. The fact that a physician must determine whether a fetus is viable on a case by case basis, rather than by simply referring to an automatic gestational time limit such as 28 weeks, does not render the standard which he is to apply

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28. The change in the quotation reflects the recent amendment to the law redefining viability. See note 9, supra. It does not alter plaintiffs' argument.

"subjective." Instead, it is a recognition of the medical fact that the point of viability varies with each pregancy and is a medical question. See Danforth, 428 U.S. at 64-65, 96 S.Ct. at 2838-2839. Likewise, the fact that a physician is to rely upon his "medical" judgment does not imply that he eschews the standards of objective reasonableness established by the medical community, and looks solely to his own past experience. To the contrary, it implies exactly the opposite. This is especially true when the clause is viewed in context: "in the medical judgment of the attending physician based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival..." (emphasis supplied). An objective reasonableness standard is patently intended to control. Because I do not read Section 2(2) as

establishing a standard which conflicts with the "reasonable medical certainty" language of Section 5(1), the latter is not unconstitutionally ambiguous and shall not be enjoined.[29]

Section 6 contains various provisions regarding a physician's standard of care for the fetus and experimentation with the fetus. Section 6(2) has already been preliminarily enjoined by the Seventh Circuit on the grounds that the phrase "aborted alive" is unconstitutionally vague in the context of a criminal

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29. Plaintiffs also argue that if the definition of viability in Section 2(2) already incorporates an "objective" medical certainty standard, then Section 5(1), because it employs the term "viable," should only need to provide that the physician "must certify" the fetus not viable. The language requiring certification of viability "with reasonable medical certainty" is rendered superfluous, say plaintiffs, by this Court's interpretation of Section 2(2).

provision.[30] This Court relied upon similar reasoning to enjoin Section 6(3) which refers to use of a fetus or "premature infant aborted alive."[31] The arguments raised presently by defendants were rejected earlier by the Court of Appeals,

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I do not agree. it is true that a Court should be loathe to find statutory language redundant or superfluous. See Colautti, 439 U.S. at 392, 99 S.Ct. at 684. However, the Court also must endeavor to interpret statutes in such a way as to find them constitutional, if that is possible. See, e.g., Atwell v. Merit Systems Protection Bd., 670 F.2d 272, 286 (D.C.Cir.1981). In this case, the two arguably redundant clauses were not found directly in the same sentence as they were in Colautti; no redundancy was immediately obvious to a reader of Section 5(1), and would become evident only after referring back to the definition found in Section 2(2). More importantly, my interpretation of the relevant language seems most consistent with the plain language of the statute, in contrast to the tortured reading pressed upon the Court in Colautti by appellants.

30. 627 F.2d at 790-91.

31. 579 F.Supp. at 383.

and a permanent injunction must issue against both subsections.

The Seventh Circuit likewise struck down Section 6(6).[32] Regardless of the stage of the woman's pregnancy, the section required physicians to inform the woman of the possibility of "organic pain" to the fetus, when there was a "reasonable medical certainty" that the particular method of abortion to be used would cause such pain. It further provided that in such situations, the doctor must tell the woman of available methods of alleviating or abolishing the fetal pain. Criminal penalties would be imposed if a physician violated the section.

The Appeals Court recognized that this requirement was a "direct burden on the abortion decision." 627 F.2d at 784. The Court found no countervailing evidence

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32. 627 F.2d at 784.

to support any purported State interest in imposing such a burden, noting that "[t]he uncontroverted medical testimony in the record at this stage describes this information as 'medically meaningless, confusing, medically unjustified, and contraindicated, causing cruel and harmful stress to ... patients.'" Id.

[6] Defendants have now submitted affidavits which they apparently hope will remove the constitutional problems found by the Court of Appeals. Their hope is unfounded. Without question, defendants' submission of evidence on this topic does not alter the legal conclusion that the dissemination of such information directly burdens a woman's decision whether to have an abortion. As to the State's interest in disseminating the information, the new evidence at most suggests that there is a difference of

opinion among the medical community regarding fetal pain. It does not affirmatively prove that distribution of the required information would be medically justified. It also therefore does not refute the finding that this section intrudes on the discretion of the pregnant woman's physician.

These conclusions are consistent with that reached by the Supreme Court in Akron. There the Court struck down a regulation requiring a doctor to describe "in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the

presence of external members" (emphasis supplied).[33] The Supreme Court ruled that "much of [that] detailed description ... would involve at best speculation by the physicians."[34] The Court further specifically referenced the District Court's finding that "there was much evidence that it is impossible to determine many of [these] items, ... such as the 'unborn child's' sensitivity to pain."[35] It is thus clear that Section 6(6) is unconstitutional and must be permanently enjoined.

Section 6(7) involves in vitro fertilization. This Court issued a preliminary injunction against it based upon its use of the phrase "human being," a term

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33. ___ U.S. at ___, 103 S.Ct. at 2489 n. 5.

34. ___ U.S. at ___, 103 S.Ct. at 2500.

35. ___ U.S. at ___, 103 S.Ct. at 2500 n. 34.

enjoined as unconstitutional.[36] Defendants correctly point out that plaintiffs have no standing to challenge this section.[37] Thus, although this Court continues to adhere to its view of Section 6(7) on the merits, the matter cannot properly be considered and no injunctive relief can be obtained.

The final three subparts of Section 6 set forth the standard of care which a doctor must follow in particular situations. Section 6(1) and 6(4) were preliminarily enjoined by Judge Flaum because they contained the term "viable," and the statutory defintion of viability had been deemed unconstitutionally vague.

[7] Section 6(4), as amended by H.B. 666, now provides in relevant part:

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36. 579 F.Supp. at 380 n. 5.

37. Memorandum Opinion, November 16, 1979, pp. 6-7.

> No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of sustained survival of the fetus apart from the body of the mother, with or without artificial support.

Thus, the section no longer regulates cases where the fetus might be capable of "more than momentary survival" outside the womb; the "sustained survival" language is utilized instead.

According to plaintiffs, however, this change is insufficient to cure the provision's infirmities. Section 6(4) continues to regulate pre-viability abortions, according to plaintiffs, because

it governs circumstances where there is even "a possibility" of sustained survival. To be consitutional, only post-viability abortions can be regulated, and those cases occur only when the attending physician determines "In [his] medical judgment ... based on the particular facts of the case before him, there is a reasonable likelihood of sustained survival of the fetus outside the womb, with or without artificial support." See §2(2) (definition of viability) (emphasis supplied). Thus, as plaintiffs read Section 6(4), the State has carved out a space of time prior to viability in which it attempts to dictate how a physician must perform an abortion. Criminal sanctions arise for a failure to follow these dictates, thereby impermissibly imposing a direct obstacle on the abortion decision. See Colautti v. Franklin, 439 U.S. 379, 386 n. 7, 96

S.Ct. 675, 681 n. 7.

Defendants respond that the section "does not purport to regulate pre-viability abortions." Rather, they argue, Section 6(4) "simply acknowledges that the physician cannot easily determine whether or not the fetus is viable--that the physician might mistake the fetus who can maintain life separate from the mother from a fetus who cannot, yet employ methods to terminate pregnancy that would make survival of a fetus who is actually viable impossible or improbable. Section 6(4) merely maximizes the opportunity for survival of a fetus who is in fact viable, but who cannot be diagnosed as viable with certainty while in the womb." Defendants' Memorandum, October 31, 1983, p. 3.

Defendants' argument disproves itself. Clearly defendants agree that two distinct circumstances are being regulated

by the State. Under Section 6(1), a physician must exercise a certain degree of care when he knows that the fetus is viable. The Act itself states that that stage of "viability" is reached when there is a "reasonable likelihood" of the fetus' sustained survival.

In contrast, under Section 6(4) the State wishes to cover another stage, in addition to that described in Section 6(1): a stage at which the doctor has less certainty that the fetus can survive. That stage clearly encompasses, by defendants' own admission, both those circumstances when the doctor believes that the fetus is reasonably likely to be capable of sustained survival and those in which he reasonably believes it may not be so capable.

It is hard for me to understand how defendants can offer the foregoing

description of Section 6(4) and simultaneously maintain that it does not attempt to regulate pre-viability abortions. Apparently defendants want the Court to distinguish between the point of viability after which abortions can be regulated and the point at which a physician, in his medical judgment concludes that a fetus is viable. Defendants wish to view viability as an absolute concept, a point in time after which the State can regulate abortions, whether or not a doctor has recognized the reasonable likelihood that this critical point has been reached.

Defendants cannot constitutionally prevail in their view. As was discussed previously, the courts and the Illinois legislature have both recognized that the point of viability cannot be defined in any absolute sense, devoid of any input by a physician. The opposite is true.

Viability is a medical question, to be determined by a physician in each individual case based on the doctor's assessment of the fetus' "reasonable likelihood" of "sustained survival." Section 6(4) does attempt to regulate pre-viability abortions, by imposing criminal sanctions on a physician for conduct engaged in during that stage. It is therefore clearly unconstitutional, Colautti v. Franklin, 439 U.S. at 386 n. 7, 96 S.Ct. at 681 n. 7, and must be permanently enjoined.[38]

Section 6(1), in contrast, no longer contains constitutional infirmities and

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38. Despite defendants' arguments, Wynn is not to the contrary. The entire discussion referenced by defendants in that case involved the regulation of post-viability abortions only. The statute at issue there contained a constitutional definition of viability and no other statutory language attempted to regulate pre-viability abortions. 449 F.Supp. at 1320, 1321 n. 5.

now may stand. The major objection raised by plaintiffs to this section is again premised upon the Colautti subjective/objective ambiguity discussed supra. Plaintiffs assert that a physician is charged with applying the same standard of care at two different stages of gestational development: when a fetus is known to be viable, under Section 6(1), and when there is a mere "possibility ... of more than momentary survival," under Section 6(4).

Plaintiffs' argument loses all persuasive power once Section 6(4) has been declared unconstitutional, as it has been here: a physician can no longer be confused by any inconsistencies between the two sections, because Section 6(4) will be stricken. More fundamentally, it is hard to understand why doctors would have been confused in any event. Unlike the

situation in Colautti, where it was unclear which of two different standards would be operative in two different situations, here the two sections "impose precisely the same standard of care on the physician for obviously different stages of fetal development."[39] Rather than causing confusion, the legislation arguably alleviates it. Regardless of which of the two stages of development had been reached by the fetus, the doctor would simply apply the one required standard of care. Finally, it must be noted that this section has already withstood the scrutiny of this Court and the Court of Appeals. For the reasons articulated

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39. This is plaintiffs' characterization of the two sections. "Plaintiffs' Joint Reply Memorandum in Support of Motion for Preliminary Injunction," November 9, 1979, p. 25.

here and in the earlier rulings,[40] Section 6(1) is constitutional. The preliminary injunction entered against it shall be dissolved.[41]

The Seventh Circuit has held that plaintiffs do not have standing to challenge either Section 7 or Section 8.[42] This Court therefore may not enter injunctive relief as to those sections.

Section 9 prohibits the use of saline amniocentesis after the end of the first trimester. Judge Flaum entered a

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40. Wynn v. Scott, 449 F.Supp. at 1320-22, aff'd sub nom. Wynn v. Carey, 599 F.2d at 194.

41. Plaintiffs maintain that Section 6(5) would be rendered meaningless if both Sections 6(1) and 6(4) were enjoined. However, because Section 6(1) has not been enjoined, no permanent injuncion shall issue as to 6(5).

42. 627 F.2d at 791.

preliminary injunction against this section[43] which defendants concede should be made permanent.

[8] Section 10 involves various reporting requirements required by the State. Judge Flaum refused to enter a preliminary injunction against the section as a whole,[44] relying in part on the fact that a more limited version of the statute had been upheld earlier in Wynn v. Scott, 449 F.Supp. at 1326-1327, aff'd sub nom. Wynn v. Carey, 599 F.2d at 194. Certain other subparts of Section 10 were enjoined by Judge Flaum, the Court of Appeals, and this Court because they referenced or incorporated other

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43. Memorandum Opinion, November 16, 1979, pp. 26-27.

44. Memorandum Opinion, November 16, 1979, pp. 27-29.

unconstitutional sections of the statute.[45]

Since the entry of Judge Flaum's order, amendments to Section 10 have been enacted. After considering the effect of these changes on the section and the numerous subsections which have already been stricken, I find that the entire section should be permanently enjoined and redrafted by the legislature.

The constitutional standards for assessing recordkeeping provisions are clear. In Danforth, Akron, and Ashcroft[46] the Supreme Court has stated,

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45. Memorandum Opinion, November 16, 1979, p. 29 n. 20 (§§10(i), (j), (l) [in part]); 627 F.2d at 784-86, 792 n. 36 (§§10(k), (o) [in part]); 579 F.Supp. at 383 (§10(n) incorporated §3.1(b), enjoined by this Court). The amendment to the definition of "viability" affects only §10(i).

46. Planned Parenthood, Kansas City, Mo. v. Ashcroft, ___ U.S. ___, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983).

as a threshold matter, that "[r]ecord-keeping and reporting requirements that are reasonably directed to the preservation of maternal health" are constitutionally permissible. Danforth, 428 U.S. at 80, 96 S.Ct. at 2846. However, as the Akron decision held, the "decisive factor" in allowing such regulation is whether "the State [meets] its burden of demonstrating that [the] regulations furthered important health-related State concerns." ___ U.S. ___, 103 S.Ct. at 2481 (emphasis supplied).

Moreover, even if the State shows that the required records serve important maternal health-related State concerns, it must also prove that the records neither infringe upon the "patient's confidentiality and privacy" nor impose a needless "extra layer and burden of regulation" upon her doctor. Danforth, 428

U.S. at 80, 96 S.Ct. at 2846. If either of these tenets were violated, the statute would impermissibly infringe upon the woman's right to choose to have an abortion.

The Supreme Court applied the foregoing principles to the recordkeeping statute at issue in Danforth, and concluded that although the provisions there were "perhaps approaching impermissible limits," they were "not constitutionally offensive in themselves." Id. at 81, S.Ct. at 2846. The Court cautioned that it assumed that the Missouri Division of Health would not interpret and implement the provisions in any way which would "accomplish, through the sheer burden of recordkeeping detail, what we have held to be an otherwise unconstitutional restriction." Id. It also stated that it had specifically relied upon "[t]he added

requirements for confidentiality, with the sole exception for public health officers, and for retention for seven years, a period not unreasonable in length," to "assist and persuade us in our determination of the constitutional limits." Id. (emphasis supplied). The Court re-emphasized the importance of these factors in Ashcroft this year. Ashcroft, ___ U.S. at ___, 103 S.Ct. at 2524 n. 14, quoting Danforth, 428 U.S. at 81, 96 S.Ct. at 2847-2847.

The Wynn Court also upheld a record-keeping statute, the predecessor statute to the one at issue today. The Court reasoned that the seven items required by the Act were not unconstitutionally burdensome because the information could be assembled quickly and recorded on forms. The information sought would be "useful in learning about the impact of

abortion on maternal health," an appropriate State goal. And, as in Danforth, the Wynn Court assumed that the Illinois Department of Health would not interpret the section so as to require a burdensome amount of detail. Wynn v. Scott, 449 F.Supp. at 1327.

The Wynn Court did find one element of the section unconstitutional: that which provided that the abortion report would be kept confidential, "except as otherwise provided by law," and which incorporated the requirement of a fetal death report for each abortion performed after 20 weeks of gestation. This portion of the statute violated a woman's right to confidentiality, said the Court. It required reporting the woman's name, and "[m]ost damaging," it would be "available upon request to a number of persons other than state officials

compiling statistics." Such a possibility of disclosure "is far from innocuous"; it could indirectly interfere with what should be a "woman's independence in deciding whether to have the abortion." Id. at 1327-1328. These provisions were therefore unconstitutional.

A comparison of the record-keeping provisions at issue in Danforth, Wynn and this case immediately makes clear that Section 10 of the present Act demands much more information from a physician and affords much less protection to a woman's privacy interests than either of the constitutional statutes. For example, the amended version of Section 10 no longer requires simply the seven pieces of straight-forward factual data required by the legislation upheld in Wynn. Section 10 now requires a physician to fill out two separate forms and

demands, on each, fifteen specified pieces of information, including "medical indications" and the "basis" for certain judgments and actions.

The range of persons who will have access to these records, and the use to which the collected information may be put is also far broader than that permitted under the carefully drawn confidentiality provisions upheld in Danforth. In contrast to the narrowly circumscribed provision at issue there, allowing only public health officers to see the records, the instant statute as now amended would allow distribution of the "redacted" copy[47] to the public at large. While the patient's name would not be specified in

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47. The "Redacted Copy" shall be identical in all particulars to the "Original Report" except that the patient identification number, attending physician's name, and facility where the abortion was performed shall be omitted.

these redacted copies, for a citizen residing in a small Illinois town, publication of information including her residence, date of birth, race and marital status could effectively identify her to her entire community. Clearly, such a result has never been and can never be tolerated by the Court because of its patent affect on a woman's protected decision whether to have an abortion. See Wynn v. Scott, 449 F.Supp. at 1328.

The Act also now allows distribution of all of the information in the original copy "to another state agency required or authorized to conduct investigations of professional or business practices in hospital, ambulatory surgical treament center, or other facility" (sic) (emphasis supplied). Although investigatory State agencies "shall not disclose individual patient information publicly," and "[a]ll

reports received by the Department shall be kept confidential and shall be used only for statistical purposes," the statutory language further provides a broad exception to the foregoing: "except to the extent necessary to secure the rights or interests of a person or the State pursuant to a court order in civil or criminal actions or proceedings to grant or revoke licenses." Not only has the legislature gone far beyond the narrow "public health officials" language which the Danforth Court acknowledged to be "approaching impermissible limits." By its broad references to "professional or business practices" of any "facility" and licensure proceedings, the legislature has exceeded any needs reasonably related to the State's interest in preserving maternal health. The effective--and perhaps intended--result of the broadly

phrased distribution provisions is to infringe on a woman's abortion decision. This infirmity, when coupled with the more onerous administrative burden placed on physicians by this statute, makes clear that Section 10 is unconstitutional.

Finally, I see no purpose in trying to retain certain disjointed lines or subparts of Section 10. Given the numbers of parts which have already been preliminarily enjoined, the additional concerns expressed herein regarding the recently amended portions of the section, and the way in which the legislators structured their drafting of the section, I conclude that an injunction against the entire section should be entered.

[9] Section 11 sets forth penalties for certain types of unprofessional conduct. Plaintiffs have not challenged subsection (a). Section 11(b) is

rendered meaningless because it references other provisions which have been permanently enjoined. As to Section 11(c), I concur with plaintiffs' view that it is drafted too broadly. It could be read as prohibiting a doctor from receiving a fee from a patient for services rendered, and then referring her to another doctor or clinic for an abortion. What the subsection was apparently intended to do is prohibit a doctor from receiving a referral fee from another doctor or clinic. This legitimate purpose is accomplished by the more carefully worded amendment to the Act, Section 11.1. Accordingly, Section 11(c) will be permanently enjoined.

Section 11(d) was enjoined by the Seventh Circuit. That Court concluded that by its "use of the term 'abortifacient' in describing certain birth

control methods [Section 11(d)] forces the physician to act as the mouthpiece for the State's theory of life."[48] Although defendants now contest this reasoning, I have neither the inclination nor the authority to dispute the Appeals Court on this matter, and therefore enter a permanent injunction as to Section 11(d).[49]

Section 11(e) was previously enjoined

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48. 627 F.2d at 789.

49. Defendants have submitted affidavits from women who state that they would want to be told whether the birth control method prescribed for them was an abortifacient. While this evidence does speak to the affiants' preferences, it does not refute the evidence supplied by plaintiffs and referenced by the Seventh Circuit that "this requirement is confusing and needlessly painful" at least as to certain other patients besides defendants' affiants. More fundamentally, the Seventh Circuit enjoined Section 11(d) because it impermissibly forced the doctor to espouse the State's theory of life. Defendants' new evidence does not affect that rationale at all.

by this Court on the grounds that the patient's name should not be disclosed.[50] I continue to see no legitimate compelling state interest which is furthered by this requirement and therefore see no justification for sanctioning it, regardless of the criminal penalties which would attach to any improper use of that information. Section 11(e) is therefore permanently enjoined. I likewise see no reason to alter my previous conclusion regarding Section 11(f)[51] and therefore also enter the permanent injunction against it.

The final section of the Act challenged by plaintiffs is Section 12, regarding pathological testing of the fetus. Although this provision is no longer rendered infirm by its incorporation of the

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50. 579 F.Supp. at 384.

51. 579 F.Supp. at 384.

term "viability,"[52] the section continues to be unconstitutional because it employs the phrase "live birth." For the reasons expressed in this Court's earlier opinion,[53] a permanent injunction shall issue against Section 12.

Section 14(2), like Sections 5(3) and 11(b) has been rendered meaningless and will be permanently enjoined.

The only remaining issue for resolution is whether the entire Act should be enjoined, as plaintiffs request. Without question, the permanent injunction entered today significantly affects major portions of the Illinois Abortion Act of 1975, as amended. I also agree with plaintiffs that the Akron Court indicated that a "clause-by-clause" parsing of a statute into disjointed pieces was inappropriate

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52. See note 9, supra.

53. 579 F.Supp. at 383-384.

in certain circumstances.[54] However, I further note that the Supreme Court did not invalidate the entire statute in Akron even though major sections of that law were held to be unconstitutional. To do so either there or in this case would be to completely ignore the legislators' intention as expressed in the severance clauses of the statutes.[55] I therefore

54. See discussion supra.

55. Plaintiffs also argue that the Preamble evidences the legislators' unlawful purpose in enacting the statute, and therefore shows that the entire Act must be enjoined. In particular, plaintiffs point to the State interests espoused and object to these as being beyond the scope of interests which the Supreme Court has said states may legitimately protect in abortion legislation.

I did not find the Preamble unconstitutional and will not premise a injunction of the entire law on that theory. An evaluation of a statute's constitutionality does not end with a review of the "interests" recited in a preamble by legislators. What is critical in assessing constitutionality is not the list of areas

decline to enter the permanent injunction against the entire Act.

A permanent injunction shall issue against the following sections: 2(8), 2(9), 2(10), 3.1(B), 3.2(A)(1), 3.2(B), 3.2(C), 3.3, 3.4, 3.5, 4, 5(3), 6(2), 6(3), 6(4), 6(6), 9, 10, 11(b), 11(c), 11(d), 11(e), 11(f), 12, 14(2).

It is so ordered.

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in which the State proclaims itself to have a legitimate interest in protecting, but what interests the courts and Constitution will recognize as legitimate and compelling in the circumstances.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

NOTICE OF APPEAL

Notice is hereby given that Intervening Defendants Eugene F. Diamond, M.D. and Jasper F. Williams, M.D. hereby appeal to the U.S. Court of Appeals for the Seventh Circuit from those portions of the final judgment entered on Oct. 14, 1983, as amended by the order entered on Nov. 2, 1983 declaring unconstituti al and permanently enjoining §§2(10), 6( ) and 11(d) of the Illinois Abortion Law of 1975, as amended, and from those portions of the Memorandum Opinion of May 13, 1983 granting Plaintiffs' Motion to Strike Defendants' Affidavits and Appendices as to Appendix 2 of Intervening Defendants' Motion for Summary Judgment and denying

Intervening Defendants' motion to file a copy of the Chicago Sun-Times series The Abortion Profiteers.

EUGENE F. DIAMOND, M.D.
JASPER F. WILLIAMS, M.D.

By: /S/
Maura K. Quinlan
One of Intervening
Defendants' Attorneys
Americans United for Life
Legal Defense Fund
230 N. Michigan Ave. #915
Chicago, IL 60601
312/263-5029

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Charles P. Kocoras

(Title omitted in printing.)

NOTICE OF CROSS-APPEAL

Notice is hereby given that Plaintiffs hereby cross-appeal to the United States Court of Appeals for the Seventh Circuit from that portion of the final judgment in this action which denies declaratory and injunctive relief against §6(1) of the Illinois Abortion Law of 1975, as amended by order entered November 2, 1983.

/S/
One of Plaintiffs' Attorneys

Charles v. Carey

Lois J. Lipton
220 S. State, Rm. 816
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312/427-7330

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OF COUNSEL:

Roger Baldwin Foundation
of ACLU, Inc.
220 S. State, Rm. 816
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312/427-7330

(Certificate of Service omitted in printing.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[SEAL]

OFFICE OF THE STATE'S ATTORNEY
Cook County, Illinois
Chicago 60602

RICHARD M. DALEY
State's Attorney

January 17, 1984

The Honorable Thomas F. Strubbe
Clerk of the Court
United States Court of Appeals
for the Seventh Circuit
27th Floor
219 South Dearborn Street
Chicago, Illinois 60604

Re: Allan Charles, M.D., et al.
v. Richard M. Daley, et al.
Docket Nos. 83-3175, 83-3176,
83-3177 and 83-3253

Dear Mr. Strubbe:

Pursuant to Rule 28(i) of the Rules of Appellate Procedure, defendant-appellant Richard M. Daley hereby adopts as his own all of the brief filed on January 13, 1984, by Eugene F. Diamond, M.D., and Jasper F. Williams, M.D., intervening defendants-appellants, with the exception

of Part III of that brief, pages 13 through 23.

A copy of this letter is being sent to all counsel of record in this appeal.

Very truly yours,

RICHARD M. DALEY
State's Attorney of Cook County

By: /S/
Robert J. Tonos
Assistant State's Attorney
(312) 443-4553
Defendant-Appellant

RJT:dh
cc: Attached

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[SEAL]

NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS

January 24, 1983

Thomas F. Strubbe
Clerk of the Court
United States Court of Appeals
for the Seventh Circuit
27th Floor
219 S. Dearborn Street
Chicago, IL 60604

RE: Allan G. Charles, M.D., et al.,
v. Richard M. Daley, et al.,

Hope Clinic v. Richard M. Daley,
et al.,
Docket Nos. 83-3175, 83-3176,
83-3177 and 83-3253

Dear Mr. Strubbe:

Please take notice that pursuant to Rule 28(i) of the Rules of Appellate Procedure, defendant-appellant Neil F. Hartigan, Attorney General of Illinois, adopts by reference the brief filed on January 13, 1984 by the intervening defendants-appellants, with the exception

of Part III of that brief, pages 13 through 23.

Should you have any questions, please contact me.

Very truly yours,

/S/
KATHLEEN KREISEL
Assistant Attorney General
General Law Division

KK:jv

cc: Merle L. Royce
Prentice H. Marshall, Jr.
Frank Susman
R. Peter Carey
Thomas J. Balch
Carol Kipperman
Roger Baldwin Foundation
of ACLU, Inc.
Robert J. Tonos

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[AMERICANS UNITED FOR LIFE
LEGAL DEFENSE FUND LETTERHEAD]

Americans United for Life
Legal Defense Fund
230 N. Michigan, Suite 915
Chicago, Illinois 60601
312.263-5029

Judicial Notice Pursuant
to Circuit Rule 11

RE: Charles v. Daley, Nos. 83-3175, 83-3176, and 83-3177

On June 30, 1984, Illinois House Bill 1399, Illinois Public Act No. 83-1128 (1984), which amended the "Illinois Abortion Law of 1975," Ill. Rev. Stat. Ch. 38, §81-21 through §81-68.4 (1984), became law. A copy is attached to this correspondence.

Two provisions of the "Illinois Abortion Law of 1975" that are presently on appeal before this court in Charles v. Daley, §§6(1) and 6(4), were amended by Public Act No. 83-1128.

In the "Intervening Defendants' Opening Brief," the discussion of §6(4) appears at page 1-5.

In the "Joint Brief of Plaintiffs-Appellees/Cross Appellants," the discussion of §6(1) appears at pages 17-22. The discussion of §6(4) appears at pages 17 and 22-24.

In the "Intervening Defendant-Appellants-Cross-Appellees Reply Brief," the discussion of §6(1) appears at pages 8-11. The discussion of §6(4) appears at pages 11-14.

Sections 2(10) (definition of abortion) and 11(d) (abortifacient labeling) of the "Illinois Abortion Law of 1975," which are also subjects of appeal in Charles v. Daley, were not amended by Public Act No. 83-1128. Nevertheless, two definitions which relate to arguments raised in Daley concerning §§2(10) and

11(d) were affected: the definition of human being (formerly §2[8]) was deleted; §2(6) (definition of fetus) was substantially amended.

In the "Intervening Defendants' Opening Brief," discussion of the use of the term "human being" appears at page 9.

In the "Joint Brief of Plaintiffs-Appellees/Cross Appellants," discussion of the term "human being" appears at page 24, n.11.

Illinois Public Act No. 83-1128 and the "Illinois Abortion Law of 1975" that it amends are subjected to present litigation in Keith v. Daley, No. 84-C-5604 (N.D. Ill., filed July 1, 1984). District Judge John A. Nordberg entered a Temporary Restraining Order enjoining the operation of Public Act No. 83-1128 on July 1, 1984.*

Respectfully submitted,

/S/
Thomas J. Marzen
Counsel for Intervening
Defendant-Appellants-
Cross-Appellees

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*Note that on pages 16-18 of Illinois Public Act No. 83-1128 also amends provisions of the "Illinois Parental Notice to Abortion Act," Ill. Rev. Stat., Ch. 38, §81-51 through §81-68.4 (1984, which is the subject of a separate appeal in Zbaraz v. Hartigan, 84-1958 and 84-1959, that is presently before this court.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 84-1379

Eugene F. Diamond, M.D., et al.,
Appellants,

v.

Allan G. Charles, M.D., et al.,
Appellees.

Appeals -- Jurisdiction Noted

In this case probable jurisdiction is noted. The case is set for oral argument in tandem with No. 84-495, Thornburgh v. American College of Obstetricians and Gynecologists.

Dated: May 20, 1985